

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

WARREN CLEWELL,

Defendant and Appellant.

G051801

(Super. Ct. No. M10319)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Reversed and remanded for a new trial.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Warren Clewell is a sexually violent predator (SVP) under the Sexual Violent Predator Act. (Welf. & Inst. Code, § 6600 et seq., (SVPA).) Clewell argues the judgment must be reversed because the court violated his constitutional right to equal protection under the law by compelling him to testify during the People's case-in-chief, and because the court erred by permitting the People to introduce a "vast amount" of inadmissible hearsay evidence. We agree his compelled testimony violated equal protection, based primarily on cases which were decided after the trial in this case concluded. Therefore, we reverse the judgment and remand the matter for a new trial.

FACTS AND PROCEDURAL HISTORY

The People filed a petition to commit Clewell as an SVP under the SVPA. The petition alleged three qualifying offenses: a 1978 conviction for forcible rape, oral copulation, and lewd acts with a child under 14 years of age; a 1973 forcible rape of a 14-year-old girl, and a 1969 rape of a 16-year-old girl. The trial commenced in March 2015. At the outset, Clewell moved to (1) preclude the People from compelling his testimony in their case-in-chief, and (2) to prevent the People from introducing hearsay evidence through the testimony of the mental health experts and the admission of certain documents. The court denied both motions.

1. Prosecution Case

a. Robert Owen, Ph.D.

Dr. Robert Owen interviewed Clewell four times between 2004 and 2014. During each interview, Owen asked Clewell about his qualifying offenses and other past crimes, and Clewell made certain admissions to him.

In 1969, then 20-year-old Clewell was convicted of statutory rape. Clewell had been driving when he saw 16-year-old Ruby K. walking on the sidewalk. Clewell stopped his car, came up behind Ruby, put a screwdriver to her neck, took her to a secluded area, removed her clothes, raped and tried to sodomize her. When Ruby screamed, Clewell covered her mouth and threatened to kill her.

In 1973, Clewell raped 15 year-old Debbie S. As Debbie walked by his car he grabbed her, put a screwdriver to her neck and drove her to an isolated area. He tied a shoestring around her hands and neck, threatened to kill her, and covered her nose and mouth while he raped her. Clewell told Owen he wanted to kill Debbie, and his “fantasies were getting a little more violent.”

A year later, Clewell was convicted of attempted murder, kidnap, rape by threat, rape by force, and other crimes, for his attack on 13-year-old Rene M. Clewell walked up to Rene, put his arm around her neck, forced her in his car, and drove away. While driving, he threatened to kill Rene and forced her to orally copulate him. Once they reached an isolated area, he raped her. He then drove to another isolated area and raped her again. Finally he beat Rene in the face and head with a wrench, took her out of the car, beat her with a rock, and drove away.

Owen testified Clewell told him, ““It’s like I was a zombie. Like I’m watching myself. I raped her. I was real brutal. I said something like “I’m sorry I have to kill you.””” Clewell did not want Rene to identify him.

Owen testified Clewell’s three qualifying offenses established a pattern. Clewell used a car and a weapon, approached each victim from behind, grabbed them, threatened them, and took them to isolated areas. In addition, Clewell was an unusual rapist in that he did not rape the victim and flee.

Owen also considered some of Clewell’s other, nonqualifying offenses. In 1965, then 15-year-old Clewell put on his sleeping stepsister’s dress, fantasized about her, and then stabbed her. She lived.

In 1968, Clewell exposed himself to two women. He also grabbed one woman at her crotch and put some kind of weapon to her body. When she screamed, Clewell fled. In 1983, Clewell masturbated in front of a correctional officer. Owen said this incident showed Clewell lacked appropriate sexual boundaries, and constituted evidence of more than one sexual disorder.

Owen diagnosed Clewell with several disorders, including sexual sadism, exhibitionism, and antisocial personality disorder. Sexual sadism is the most significant disorder because it causes him to harm people.

Owen noted Clewell's parole history is poor. For instance, Clewell was in prison for 12 years for the offenses against Rene. Clewell was released in 1990 and soon involved in a burglary. After returning to custody, Clewell was paroled in January 1992. In September 1993, Clewell was incarcerated again. By December, he was released, but he returned to custody in September 1997. The longest period of time Clewell has spent outside of prison is three years and nine months.

In determining whether Clewell was likely to commit predatory sexual offense in the future, Owen evaluated him using the Static-99R assessment tool. Clewell scored a six, which places him in the high risk category. In Owen's opinion, Clewell poses a substantial, well-founded level of risk of engaging in sexually violent criminal behavior due to his diagnosed mental disorders.

b. William Damon, Ph.D.

Dr. William Damon, a forensic psychologist, first evaluated Clewell in 2001. Damon reviewed Clewell's criminal history and institutional records, including police reports, probation reports, psychological evaluations, psychosexual history, hospital records, and prison records. Damon, too, noted Clewell's disturbed childhood, and testified Clewell's stepmother had violent and abusive sex with him. She restrained him and inserted objects in his rectum.

Damon's testimony about Clewell's qualifying offenses was similar to Owen's, but there were some additional facts. For instance, Clewell told Damon he instructed Ruby to "[d]o what I tell you and I won't hurt you." According to Damon, Ruby told Clewell she was menstruating and Clewell replied, "That's not what I want you for baby."

After the incident with Debbie, Clewell admitted he had a serious problem, and he said he needed help. Clewell did not want to be released because his offenses were becoming more violent. Clewell admitted hitting Rene with a wrench because he wanted to kill her and avoid capture. Clewell told Damon he would have murdered his next victim had he not been caught in 1978.

Damon testified Clewell admitted he had committed two additional rapes, and Clewell repeated this information to another doctor in 2013. One of these unadjudicated rapes reportedly occurred at a laundromat just months before Clewell raped Debbie. The other occurred with a hitchhiker. The victims were women between the ages of 25 and 35.

Clewell also admitted a 1968 incident. He approached Delores C. from behind, put his hand around her waist, jabbed something into her ribs, and said, “Come with me or else.” Delores responded, “You got to be kidding. If you don’t stop, I’ll scream.” Clewell grabbed the woman between the legs and fled.

Damon diagnosed Clewell with two paraphilia, sexual sadism disorder and exhibitionistic disorder, and antisocial personality disorder. Damon also scored Clewell a six on the Static-99R, which indicates he has a 26 percent chance of reoffending in five years and a 37 percent chance in 10 years. Damon concluded Clewell presents a serious and well-founded risk of committing sexually violent crimes without appropriate treatment in custody.

c. Jean Richardson

Jean Richardson is a licensed clinical social worker at Coalinga State Hospital. In 2009, she was one of Clewell’s sex offender treatment providers. During group sessions, an emotional Clewell talked about his stepmother. He accused her of sexual abuse, aggression, and violence, and he said he wanted to harm his stepmother. Richardson believed Clewell stabbed his stepsister as an act of aggression toward his stepmother.

In January 2014, Clewell surprised Richardson in a patient area of the hospital. Clewell whispered, “I want to fuck you,” and his voice was menacing. Richardson was surprised and alarmed, but she used her firm and clear command voice and said, “Stop it, Mr. Clewell,” and “I heard what you said, don’t do it again.” Clewell gave Richardson a confused look, and she went into an office to sign in and speak to her supervisor.

Clewell denied saying anything to Richardson. He said he would avoid her in the future. However, he said he wanted to stay away from Richardson because she had a look in her eyes that told him she wanted to be hurt. Richardson told Clewell she did not want to be hurt, and she asked him if he understood. Clewell said he did. His treatment plan required Clewell to stay away from Richardson, and there were no further incidents.

d. Rene M.

Rene testified she was 13 years old in May of 1978 when Clewell came up, put his arm around her neck, and threatened to kill her if she did not keep quiet and come with him. Clewell forced Rene into his car and forced her head down. Clewell drove around while he forced Rene to orally copulate him. When Clewell stopped, he removed her clothes, and raped her “a couple [of] times.” He had her lie down in the front seat of the car and then hit the back of her head “with . . . a crowbar or something.” Rene thought she passed out because when she awoke, she was lying on a pile of rocks, and Clewell had a rock in his hand. Rene pleaded with Clewell not to hit her in the face but he did “several times.”

A terrified Rene tried to get away, but she was too afraid to scream. Rene had never had intercourse, and she remembers very little. She does remember the voices of the people who found her and thought she was dead. Rene gave the police a physical description of her attacker. Clewell has a distinctive tattoo, “TT Triumph.”

Rene spent a week in intensive care and an additional week in the regular hospital. She had multiple skull fractures and a broken nose. Rene endured several surgeries. She has a metal plate in her head and large scars on the back of her head. Her vision was blurred by swelling around her eyes and she had to wear a patch over one eye for a while. Plus, the ligaments in her right pinkie finger were torn.

e. Clewell

Clewell was born in July 1949, and his childhood was terrible and painful. His stepmother had violent sex with him. Clewell said his stepmother's violence led him to use sex as a coping mechanism. His stepmother also taught him how to stalk animals and people. His stepmother stopped training him when he was 13 or 14 years old. Clewell said he had no feelings about the training ending. He said they were either "suppressed or beat out of [him]." Clewell said his relationship with his stepmother was based on rage.

When Clewell was 10 years old, his stepmother told him rapists and murderers scared her, so he promised himself he would rape her and he started to stalk her. Clewell said he was waiting for his stepmother with a shotgun on his lap the day he stabbed his stepsister. When his stepmother did not come home, he took a boning knife from her bedroom, went into his stepsister's bedroom, and stabbed her with it.

When Clewell's stepmother sold a truck he wanted, he decided "that was the last straw, you know, it was like that's the last thing you're taking from me." As he explained it, "That's what people don't understand, it was not the sex, it was the rage that was the motivation for me."

Clewell denied having sexual fantasies about his stepsister. He attributed the stabbing to his rage. He also denied masturbating. Clewell admitted to wearing his stepsister's dress, for some unknown reason, but said he was not wearing the dress when he stabbed her.

Clewell attributed the incident involving Ruby to a conversation he had with his grandmother. He told his grandmother that as a little boy he had seen a woman in a dress with pearls, but he had not seen her face. His grandmother told him the woman was his mother. This made him angry. He started to drink alcohol and felt “in rage at myself, not at anybody.” As he was driving around later, he happened to see Ruby and decided to rape her.

Clewell described it as being an animal with its prey. He parked his car, got out, and waited for her to walk by. When Ruby walked past him, he grabbed her from behind and said, “do what I tell you and I won’t hurt you.” Ruby was afraid, but he did not enjoy her fear. He also denied enjoying the sex and violence he perpetrated on Ruby, but he admitted raping her.

Clewell admitted he raped Debbie as described above. Again, the rape had not been planned, but Clewell said he was following his stepmother’s training. The violence with Debbie came after he raped her, and she lived because the “tug of war inside of [him]” came out in her favor. He wanted someone to stop him since he knew something was wrong.

In 1973, Clewell tried to get sex offender treatment at Atascadero State Hospital, but they did not teach him how to apply what he had learned even though he spent five years in treatment. After his release, Clewell began drinking. He returned to his family even though it was recommended he stay away, and he started taking drugs after his boss at Bob’s Big Boy gave him a No-Doze.

Clewell was aroused by the violence of the 1978 offense, but it was not sexual. He admitted he might have killed someone had he not been caught. He realized his crimes were becoming more violent and his victims were getting younger. However, Clewell said he now has the ability to stop himself. Clewell spent 1978 through 1990 in custody.

Clewell explained he had taken the rage he felt toward his stepmother out on the whole world, and he did not trust anyone enough to seek help. He recalled talking to the doctors about his attempted rapes of other victims but not what he said. He denied attempting to rape or raping, a woman in a laundromat. Clewell explained a doctor asked him if he had any fantasies of raping women in other places so he described a fantasy about raping a woman in a laundromat. He also told a doctor a fantasy he had about attempting to rape a hitchhiker.

Clewell denied telling Richardson, "I want to fuck you." He also denied planning or fantasizing about verbal aggression against Richardson, and he disagreed that Richardson reminded him of his stepmother. Clewell felt betrayed by Richardson and dropped out of her treatment group. He did tell the treatment team Richardson had a look in her eye he had seen before when people want to be hurt, but he denied threatening Richardson.

Clewell participated in individual therapy at Coalinga State Hospital with three different staff members over the years. In 2006 he began Phase I of the sex offender treatment program. By 2007, Clewell was in Phase II. Clewell described the program as a positive experience. He was almost ready to go into Phase III. Then, Clewell talked to his treatment team and they agreed he could take a break from treatment to allow him to work on his autobiography. He started treatment again with the New Life Module in 2012.

Clewell denied fantasizing about violence against women. He believes he has gained empathy for his victims. He admitted having problems with intimate relationships in the past, but he does not believe he would have problems in the future. He denied being a sexual sadist. He thinks his problem is communication, gaining perspective about his past, being in the present, anger, sexual confusion, violence, trauma, and letting go of betrayal. He asserted he now has control over these things and himself.

Clewell does not believe he has a mental disorder. He no longer feels like an exhibitionist. His antisocial tendencies went away in 1995 or 1996. Clewell asked how he could have antisocial personality disorder when he likes and gets along with other people. Clewell testified he is ready to be back in the community, and he feels he has received sufficient treatment to prevent him from reoffending in a criminally violent sexual manner in the future.

2. The Defense Case

a. Brian Abbott, Ph.D.

Dr. Abbott is a clinical psychologist and expert witness hired by Clewell to explain the science of evaluations and to provide insight into how to interpret the state's evaluations. Abbott criticized the People's experts for using the Structured Risk Assessment Forensic Version tool to select a reference group on the Static-99R. According to Abbot, had the prosecution experts used the correct reference group, Clewell would have received a much lower score than six.

Abbott also attacked the use of the Static-99R to estimate risk of reoffending. Abbott said the Static-99R registers a positive result for any type of sexual recidivism, and in SVP proceedings, only sexually violent predatory acts are relevant. In Abbott's opinion, the Static-99R does not fully account for the risk mitigation effects of advancing age, and it produces a group estimate, not an individual risk assessment.

Abbott noted eight studies about the effect of age on recidivism. The results showed the incidence of reoffending declined with advancing age. Younger people reoffend at a higher rate than offenders 60 years old or older. Specifically, the recidivists as a whole reoffend at the rate of 17.6 percent. However, members of the over-60 group reoffend at a rate of 3.2 percent. Thus, in Abbott's opinion, the People's experts overestimated Clewell's risk of reoffending by more than 500 percent.

b. Elisabeth Inomaa-Bustillos, Ph.D.

Inomaa-Bustillos is a staff psychologist with the Department of Corrections. She provided Clewell individual treatment from October 2013 to October 2014. Clewell had 50-minute sessions with Inomaa-Bustillos once a week for 52 weeks.

Inomaa-Bustillos reported he did well in individual therapy. One of his objectives was to “look at childhood experience, some of the trauma that he had endured, some of his earlier behavior and how it played out and how it impacted his adolescent and adult behavior in the choices that he made.” Clewell also worked on connecting his earlier experiences and with his choices.

Inomaa-Bustillos told Damon that Clewell was exploring how his child abuse related to his offending behavior, world view, and coping mechanisms. Inomaa-Bustillos said Clewell originally viewed the world as hostile, and he had a lot of suppressed anger and hurt. By exploring his various experiences, Clewell was able to broaden his world view, and to not take things personally. Inomaa-Bustillos said Clewell’s disposition and engagement with the world changed.

Inomaa-Bustillos administered the HCR-20, a violence risk assessment tool. She reported Clewell had a low risk because he had done well at the hospital, and there were no charges brought against him with respect to Richardson. Inomaa-Bustillos said Clewell had a handle on his triggers and he had unique and effective coping mechanisms, i.e., writing, drawing, and reading.

c. Hilary Trytten, Ph.D.

Trytten is a psychologist with the Department of Corrections and Rehabilitation. Clewell was part of Trytten’s sex offender treatment group, but he also attended her childhood abuse group for a while. Clewell’s childhood abuse became overwhelming for him so “he had to step back for a little bit,” which is not uncommon, and he was not able to return. In Trytten’s opinion, Clewell had learned some coping skills and he had the ability to apply them.

DISCUSSION

1. Equal Protection and the Testimonial Privilege

Before trial, Clewell moved to prevent the prosecution from compelling him to testify, based upon equal protection principles and the California Supreme Court's decision in *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 826 (*Hudec*). There, the high court decided a defendant found not guilty by reason of insanity (NGI) had an absolute right not to be called as a witness against himself. Here, the trial court denied Clewell's motion based on *People v. Leonard* (2000) 78 Cal.App.4th 776, 790-791 [no Fifth Amendment right under SVPA, citing *Allen v. Illinois* (1986) 478 U.S. 364 [same under Illinois's Sexual Dangerous Persons Act].)

After the trial in this case, the appellate court in *People v. Curlee* (2015) 237 Cal.App.4th 709 (*Curlee*) held SVP's and NGI's are similarly situated for purposes of the testimonial privilege, based on the holding in *Hudec* and the similarities between the SVPA and NGI commitment statutes. (*Curlee*, at p. 721.) Another panel of this court reached the same conclusion in *People v. Landau* (2016) 246 Cal.App.4th 850, 864 (*Landau*). (See *People v. Dunley* (2016) 247 Cal.App.4th 1438, 1450 (*Dunley*) [mentally disordered sex offenders (MDO's), SVP's, and NGI's are all similarly situated for these purposes].) We agree with these cases.

The People do not seriously dispute this issue. Instead, the Attorney General argues: (1) disparate treatment of SVP's and MDO's regarding the testimonial privilege must be evaluated under the rational basis test; and (2) any error in compelling Clewell to testify was harmless.

We reject these arguments. The rational basis test is not the applicable standard. "The California Supreme Court has long held that under California law, equal protection challenges to involuntary civil commitment schemes are reviewed under the strict scrutiny test because such schemes affect the committed person's fundamental interest in liberty. [Citation.]" (*Dunley, supra*, 247 Cal.App.4th at p. 1451.)

The People do not argue the disparate treatment at issue in this case could pass muster under the strict scrutiny test. Given the absence of any such argument, the People apparently concede the merits of Clewell’s equal protection claim under the strict scrutiny standard. As a result, there is no need for us to remand this case for an evidentiary hearing as the court did in *Curlee*, where the People claimed they could demonstrate a compelling state interest which would support differential treatment of SVP’s regarding the testimonial privilege. (*Curlee, supra*, 237 Cal.App.4th at p. 722.)

Also, the harmless error rubric does not apply. As the California Supreme Court explained in *People v. Blackburn* (2015) 61 Cal.4th 1113, “This court and the high court have applied harmless error analysis to a wide range of errors and have recognized that most errors can be harmless. [Citations.] But we have explained that certain errors, which operate to deny a defendant an “‘orderly legal procedure’” [citation], can entail a ‘miscarriage of justice’ under California Constitution, article VI, section 13.” (*Id.* at p. 1133.) Such errors, “require[] reversal without regard to the strength of the evidence” (*Ibid.*)

Compelling an SVP’s testimony against himself is one such error. “The right to not be compelled to testify against oneself is clearly and relevantly implicated when a person is called by the state to testify in a proceeding to recommit him or her even if what is said on the witness stand is not per se incriminating.” (*People v. Haynie* (2004) 116 Cal.App.4th 1224, 1230.) “[B]y calling the person in its case-in-chief, the state is essentially saying that his or her testimony is necessary for the state to prove its case. We have no doubt that a committee so compelled to testify is prejudiced under these circumstances.” (*Curlee, supra*, 237 Cal.App.4th at p. 722; see also *Landau, supra*, 246 Cal.App.4th at p. 865 [““we cannot conclude that compelling [the committee] to testify, even if his testimony is in some regards cumulative . . . was harmless error””].)

The prejudice was manifest in the deputy district attorney's cross-examination of Clewell and the manner in which she exploited his testimony in her closing argument, where she emphasized Clewell's feeble explanations for his past behavior and his mental state.

For all these reasons, we hold the trial court erred by compelling Clewell to testify against himself, and the error requires reversal.

2. *Inadmissible Hearsay*

Clewell also argues the court violated his due process right to a fair trial by permitting the People to introduce hearsay evidence through the testimony of the mental health experts and the admission of certain documents. This argument is moot in light of our disposition of his equal protection claim above. However, because we will reverse and remand the matter for a new trial, we offer the following observations.

For many years expert testimony could be premised on certain categories of inadmissible hearsay. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-618.) However, the California Supreme Court recently reconsidered the issue in *People v. Sanchez* (2016) 63 Cal.4th 665, 684 (*Sanchez*).

Sanchez held, "Under *Crawford* [*v. Washington* (2004) 541 U.S. 36], if [a hearsay] exception was not recognized at the time of the Sixth Amendment's adoption [citation], admission of testimonial hearsay against a criminal defendant violates the confrontation clause unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing. [Citations.]" (*Sanchez*, at p. 680.)

Consequently under *Sanchez*, "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Sanchez, supra*, 63 Cal.4th at p. 686, fn. omitted.) Therefore, the prosecution must show unavailability of a witness, and that the defendant either "had a prior opportunity for cross-examination, or forfeited that right by wrongdoing" to avoid the confrontation problem. (*Ibid.*)

Further, while the Confrontation Clause does not apply to civil commitment proceedings (*People v. Otto* (2001) 26 Cal.4th 200, 214.), California's evidentiary rules do apply to both criminal and civil proceedings. (*People v. Roa* (2017) 11 Cal.App.5th 428 [*Sanchez* applies to civil proceedings under the SVPA]; *People v. Burroughs* (2016) 6 Cal.App.5th 378 [same].)

DISPOSITION

The judgment is reversed and the matter is remanded for a new trial.

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.